SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 392

NATHAN WISSNER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

PETITIONER'S BRIEF

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Opinion Below

The Court of Appeals of the State of New York affirmed without opinion the conviction of and the death sentence imposed upon petitioner, 303 N. Y. 856.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1257, and Rule 38 of the Rules of the Supreme Court of the United States, on the ground that petitioner was denied his constitutional rights under the Fourteenth Amendment to the Constitution of the United States in that he was deprived of due process of law in the proceedings below. This Court granted his petition for a writ of certiorari on October 13, 1952.

Specification of Errors Assigned

Petitioner, who had made no confession of guilt, was deprived of due process of law at his joint trial with two other persons who had confessed, by the admission into evidence of their two confessions inculpating petitioner, without deletion therefrom of petitioner's eighty-eight times repeated name, when the confessions of the co-defendants were concededly obtained after prolonged questioning, incommunicado, by police working in relays, during an illegal delay in arraignment—an issue existing as to whether the confessors were beaten.

Statement of the Case

On December 21, 1950, your petitioner, together with Calman Cooper and Harry A. Stein, was convicted of murder in the first degree, after a joint trial before a jury, by the County Court of Westchester County, State of New York, and was sentenced to death. The conviction was for a homicide committed "without a design to effect death by a person engaged in the commission of a felon" (N.Y. Penal Law, Section 1044, subd. 2, set forth in the appendix).

The facts may be briefly stated as follows:

On April 3, 1950, at about 3 P. M., four persons held up a Ford truck, owned by the Reader's Digest Association, on a private roadway leading from the Reader's Digest plant at Chappaqua, New York. The truck was being driven by William Waterbury who was accompanied by a guard, Andrew Petrini. A single shot fired by one of the robbers standing on the roadway passed through the window glass of the door of the truck and caused Petrini's death.

The perpetrators of the crime escaped unapprehended, with three bags containing checks and currency, the property of the Reader's Digest Association.

Just over two months later, in the early morning of June 5, 1950, Calman Cooper, in the company of his elderly father, was arrested on the street in New York City; both were taken to the State Police Barracks at Hawthorne, New York. There Cooper was held, clothed and handcuffed continuously, in an office room, incommunicado, for four days until his arraignment on the night of June 8th. In the meantime he was interrogated by State Police officers working in relays, according to their testimony (R. 1312-1313, 1317, 1361, 1403-1404, 2072, 2087, 2103)[1] on June 5th and June 6th for at least a total of twenty hours. His questioners were Officers Sayers, Buon and Barker (R. 1361, 1403).

At 10:45 P. M. on June 6th he commenced to confess, and signed a typewritten question and answer statement at 2 A. M. on the morning of June 7th. During this time his father, as well as his brother, who had also been arrested on June 5th, were confined and likewise held incommunicado by the State Police at the barracks.

Harry A. Stein was arrested in New York City at 2 A. M. on June 6th, 1950. He too was taken to the State Police Barracks at Hawthorne and there held, clothed and handcuffed continuously, in a locker room, incommunicado, until his arraignment on the night of June 8th. He was arrested at the apartment of his brother, who communicated with an attorney on his behalf in the early morning of June 6th, but the attorney, despite repeated and vigorous efforts, was unable to locate Stein until after the arraignment. Stein was interrogated by the State Police officers working in relays, according to their testimony (R. 1905-1909, 1925-1926, 1931) on June 6th and June 7th for at least fifteen hours. His questioners were Officers Glasheen and Johnson (R. 1909, 1926). He commenced to confess

[1] References thus are, unless otherwise indicated, to the pages of the Record.

around 10 A. M. on June 7th and about 4:30 P. M. on that day signed a typewritten question and answer statement.

Wissner was arrested on June 7th at about 9 A. M. in New York City and carried off to the same barracks at Hawthorne. He, too, was interrogated but he made no confession. Instead he steadfastly maintained his innocence (R. 2030, 2245). He, too, was held incommunicado until the night of June 8th before being arraigned. His wife was arrested with him and taken to the same State Police Barracks, where she, too, was held incommunicado until June 8th when, as a condition of her liberation from confinement there, the police required her to execute a release absolving the State Police Sergeant from liability (Ex. S, printed R. 2960, offered R. 2255).

The District Attorney of Westchester County testified that he became aware on the afternoon of June 7th that Cooper had been in custody since the morning of June 5th. Cooper had not yet confessed at that time, nor had Stein who was also in custody. All three defendants continued to be held incarcerated without being arraigned before a Magistrate until 10 P. M. on June 8th, 1950, and then the charge against them at the arraignment was made in the form of an affidavit "upon information and belief" by the State Police Sergeant, the grounds of said information and belief being stated to be the aforesaid confession of Calman Cooper (Ex. 60 for id., printed R. 2891-2892, marked R. 1271).

The Trial Court ruled as a matter of law that the delay in arraignment of the three defendants was unnecessary and hence illegal, being in violation of state statutes (Sec. 1844, N. Y. Penal Law; Sec. 165, N. Y. Code Crim. Proc., set forth in the appendix).

Immediately after the arraignment all three were lodged in the County jail, where they were held each in solitary confinement, in widely separated cells.

Early on the following morning (June 9th) they were separately examined by the prison physician.

On Cooper he found bruises on the left side of the chest, also on the abdomen, also in the right bicep area, and also on both buttocks.

On Stein the physician found bruises in the left bicep area (so he reported, at least). An attorney who examined Stein the same day observed bruises on both arms and on the area below the left breast.

On your petitioner Wissner, who had made no confession, the prison physician observed the most extensive injuries: there were bruises on the left side of the chest; the fifth rib on the left side was broken; there were also abrasions of both shins, bruised areas on the thighs, the left side of the abdomen, and the buttocks; and there was a lump on the head.

Objection was made by all the defendants to the admission in evidence of the Cooper and Stein confessions as having been obtained by unconstitutional means (R. 1381, 1275-1280, 1967, 1990, 1583). The prosecution denied that physical brutality had been employed, but presented no testimony to explain how all three defendants in the same case had simultaneously acquired such injuries. The police witnesses themselves established however—so that it cannot be disputed—that the confessions were obtained after prolonged intensive questioning by relays of questioners during an extended illegal delay of arraignment while the prisoners were held incommunicado without access to family, friend or counsel, or notice of their rights.

Wissner further objected to their admission to evidence, no matter how obtained, in a trial in which he was one of the defendants, on the ground that he would be so unalterably prejudiced by them, despite any instruction from the Court, that it would become impossible for him to have a fair trial,

and asked a severance of his case from the others. The objections overruled and the severance denied, he importuned the deletion of his name from the confessions; that, too, was refused.

The gist of the confesions obtained from Cooper and Stein was that they had committed the crime together with Wissner and one Dorfman, who was Wissner's partner in an auto renting business on New York's lower East Side.

Dorfman, accompanied by an attorney, surrendered to the District Attorney on June 19, 1950, after he had taken the precaution of having his body photographed and examined by a physician prior to surrendering. Subsequently, after his wife had been imprisoned and long held in custody, he became a witness for the prosecution and his wife was then released; his case was severed from that of the other defendants at the beginning of the trial, and it does not appear that any disposition was made of the indictment as against him.

This accomplice witness, Dorfman, furnished the main testimony against Wissner, and placed him at the scene of the crime. As to numerous details, however, his testimony was hopelessly inconsistent with that of other witnesses called by the prosecution, as well as with the confessions of Cooper and Stein. The Reader's Digest truckdriver, Waterbury, identified Wissner, whom he claimed to have seen for only a couple of seconds, and testified that this petitioner was, at the time, wearing a felt hat, the frames of a pair of spectacles without any glass in them and with a large false nose suspended from the frames. This witness had made a statement to the District Attorney one hour after the hold-up however, which was stenographically recorded, in which he made no mention whatever of *any* of these striking and bizarre details, in which he was able to describe only one of

the robbers as "a heavy set fellow who wore glasses", and in which he averred that the robbers had worn "no masks".

There was no other testimony offered that connected this petitioner with the commission of the crime; however, two other prosecution witnesses were called to show prior and subsequent association by the defendants.

This petitioner moved in advance of the trial for a severance and a separate trial, alleging that it would be impossible for him to obtain a fair trial—he not having confessed—if he were tried jointly with two other defendants who had made confessions implicating him (R. 38-40). This motion was denied.

At the outset of the trial after the District Attorney's opening statement (R. 158-159), also when each of the confessions was offered in evidence (R. 1519, 1967-1968), also when the contents of each confession were being considered by the Court, and at numerous other appropriate times during the trial (R. 1451, 1455-1457, 1900, 1995, 2277-2278, 2529), this petitioner reiterated his application for a severance and a separate trial, stating that he was being deprived of the right to confront the witnesses against him (R. 1900, 2529, 2277-2278).

Since all of these motions were denied, he urgently importuned the Trial Court *at least* to delete his name from these confessions in order to minimize the inevitable prejudice to him from their introduction in evidence (R. 1502, 1503, 1504, 1505-1514, 1888, 1890, 1891, 1893), reiterating that he could not confront the witnesses (R. 1897). His name was mentioned *eighty-eight times* in the confessions, together with the most detailed and prejudicial accusations against him. Nevertheless, this minimal safeguard of his rights was summarily refused.

Having summarily denied even such minimal safeguard against prejudice, the Trial Judge in summarizing the con-

fessions in his charge to the jury, himself gave minutely detailed prominence to the accusations against this petitioner contained therein. Further reference to this anomaly is made, with pertinent excerpts, *infra*, pp. 21-22.

It is true that the Trial Court gave lip service to this petitioner's rights at a point in its charge separated by fourteen pages from this discussion of the contents of the confessions, by a perfunctory statement that the confessions were only to be considered against those making them.

The District Attorney in his summation to the jury also read inflammatory extracts from each of the confessions, similarly selecting only portions thereof dealing with this petitioner.

Point I

The Admission of the Coerced Confessions of the Other Two Defendants, Without Elimination Therefrom of the Accusations by Name Against Petitioner, Deprived Petitioner of His Right to Due Process.

A. *The Confessions Were Inadmissible*

At the trial, testimony was taken in the presence of the jury on the issue of the voluntariness of the confessions of Cooper and Stein, before they were admitted to evidence.[2]

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[2] The defendants themselves did not take the stand. An unsuccessful effort had been made by Stein, in a different court, prior to the trial, to secure a judicial hearing out of the presence of the trial jury of the circumstances under which his confession was obtained. That application was supported by Stein's affidavit relating the horrifying details of the beatings and torture to which he was subjected—those papers being marked Exhibit H for Identification (R. 1843).

Unlike the federal procedure, a preliminary hearing at the criminal trial, out of the presence of the jury, on the question of the admissibility of a coerced confession is not permitted by the Courts of the State of New York. *People* v. *Randazzio*, 194 N.Y. 147, 159. Hence, a defendant is unable to present his own testimony on this particular issue without exposing himself to general cross-examination in the presence of the jury upon such extraneous matters as the merits of the charge against him, prior convictions for other crimes, etc.

No proof was offered by the prosecution to explain the extensive bruises, contusions and other indicia of injury found by the prison physician spread over all three defendants' bodies the morning after the night of their arraignment, even on such portions of the body as the buttocks, or to show that they were not caused by the blows of policemen. In his closing argument to the jury, the prosecutor's comment thereon was that these injuries "could have been self-inflicted". This cannot constitute a satisfactory accounting, except to the most eagerly credulous, considering that each prisoner admittedly was held in solitary confinement without opportunity for consultation. Also, upon this hypothesis, one has to assume that Wissner, who had made no confession to be explained away, immediately after arraignment broke his own rib, abraded his shins, and bruised his thighs, his abdomen, his head and his buttocks!

The Trial Court ruled that there was an issue of fact as to coercion to be determined by the jury, and hence admitted the confessions to evidence.

It is not possible to determine how the jury resolved this issue, inasmuch as the Trial Court declined to instruct the jury to acquit if they found the confessions to be involuntary (R. 2779, 2782). Instead, they were instructed, in that event, to reject the confessions ~~in considering~~ the evidence (R. 2767, 2769), and the District Attorney argued to them that there was sufficient evidence without the confessions.

The anomalous practice of the State of New York, therefore, first permits the jurors to become cognizant of the content of the confessions and then calls upon them to disregard the confessions (if involuntary) in appraising the rest of the proof. One need only read the confessions of Cooper and Stein to appreciate the utter impossibility of anyone performing this psychological feat. "* * * when the confessions and admissions had resulted in establishing

the truth and accuracy of the testimony given by [others], could the jury then weigh the credibility of that testimony over again, ignoring the very testimony which had already substantiated it? Certainly jurors are not accustomed to weigh evidence in that manner, and I confess that neither legal training nor long judicial experience has given me the ability to do so." (Lehman, J. dissenting in *People* v. *Fisher*, 249 N. Y. 419, 431-432.)

If the admission of the confessions denied a constitutional right to the defendants, the error would require reversal, regardless of whether the other evidence in the record was sufficient to justify the general verdict of guilty. *Lyons* v. *Oklahoma*, 322 U. S. 596, 597, footnote 1; *Malinski* v. *New York*, 324 U. S. 401, 404.

Even if one were to accept the disingenuous flat denials of the police that the defendants were beaten, the facts admitted by the prosecution witnesses rendered the admission of the confessions a denial of due process of law as expounded in *Watts* v. *Indiana*, 338 U. S. 49; *Turner* v. *Pennsylvania*, 338 U. S. 62; and *Harris* v. *South Carolina*, 338 U. S. 68. It is true that these cases were decided by a closely divided court. But counsel do not understand that this Court has ever departed from the propositions there laid down in a case where all the circumstances of the case required a similar disposition. Thus, in *Johnson* v. *Pennsylvania*, 340 U. S. 881, the petition for a writ of certiorari was granted and the conviction reversed without further hearing, upon the authority of *Turner* v. *Pennsylvania*, *supra*, with only two members of the Court dissenting. And as recently as April 7, 1952, this Court in *Stroble* v. *California*, 96 L. Ed. (Adv. Op.) 529, found occasion to mention with approval its condemnation of the "pressure of unrelenting interrogation" in *Watts* v. *Indiana*, *supra*.

The admission in evidence of a confession obtained dur-

ing illegal detention incommunicado, following persistent police interrogation, by relays of questioners, for a prolonged period, without preliminary hearing or the least suggestion of elementary rights, and without opportunity to consult or commuicate with family, friend, or counsel, results in a denial of due process of law—certainly at least in a capital case where a serious issue exists whether, in addition, the defendants have been subjected to physical brutality. *Watts* v. *Indiana, Turner* v. *Pennsylvania, Harris* v. *South Carolina, supra.*

Here the arraignment of the three defendants was wilfully and wrongfully delayed, in violation of the statutes of the State (Sec. 1844, New York Penal Law; Sec. 165, New York Code of Criminal Procedure, set forth in the appendix), with the knowledge and clear acquiescence of the District Attorney himself.

The Trial Court eventually so ruled as a matter of law, in a supplement to its charge (R. 2777, at bottom), although in the body of the charge in the context of its discussion of factors pertinent to a determination of voluntariness, the Court had first erroneously submitted this, too, as a question of fact for the jury.

That Cooper and Stein were submitted to prolonged interrogation by relays of questioners during this extended period of illegal detention, while held incommunicado, handcuffed at all times, under constant armed guard, was conceded by the prosecution witnesses. Even according to the police version, each of these defendants was questioned persistently on two different days, in the case of Cooper for at least twenty hours, and in the case of Stein for at least fifteen hours. It is safe to assume, considering the source of the testimony, that these estimates were not inflated.

Of course, these defendants were not advised of their right to counsel—or, for that matter, of any of their rights

of which they were being effectively deprived—and indeed in the case of Stein, persistent efforts over a period of three days by an attorney to locate Stein were unsuccessful—a circumstance which the Trial Court, it might be noted in passing, seemed to consider immaterial (R. 1834-5). Although these men had been arrested in New York City, where there was surely no lack of facilities, each was spirited away to an isolated State Police Barracks in Westchester County where there were no facilities at all for prisoners, and there secreted for days.

Nor were these defendants permitted to communicate with their family or friends. Cooper's elderly father, and his brother, were also arrested and likewise held incommunicado without arraignment; the prosecution affirmatively proved that Cooper was driven to the resort of bargaining for their release, in exchange for which it is said he "offered" to confess. (A strikingly similar circumstance was described in *Harris* v. *South Carolina*, *supra*, as a part of the complex of police conduct which there was held a deprivation of due process.)

Concerning all of the foregoing circumstances there is no contravening testimony.

As the then Chief Judge of the New York Court of Appeals wrote in his dissenting opinion in *People* v. *Malinski*, 292 N. Y. 360, 386:

> "We cannot close our eyes to the fact that our frequently and solemnly repeated admonitions to law enforcement officers that they are not above the law and may not in their zeal to obtain convictions hold, without arraignment, persons suspected of crime in order to have opportunity to obtain confessions, are often unheeded."

Such admonitions may be expected to continue unheeded, so long as cases such as the present one are affirmed without comment or corrective action by State Courts of review.

B. *The Admission of the Confessions Violated Petitioner's Rights*

In *Malinski* v. *New York*, 324 U. S. 401, this Court, while reversing the conviction of Malinski whose confession had been improperly obtained, remanded the case of Malinski's co-defendant, Rudish, to the New York Court of Appeals for further consideration by that Court, in view of the decision as to the invalidity of Malinski's conviction. This Court, in declining to reverse as to Rudish, emphasized the effort which had been made to protect Rudish from the effect of Malinski's confession by the deletion of Rudish's name therefrom, a procedure said to have had "the complete approval of counsel for Rudish". Upon the remand, the New York Court of Appeals ruled (*People* v. *Rudish*, 294 N. Y. 500, 501):

> "Nevertheless, since the Supreme Court of the United States directed a new trial as to Malinski because one of his confessions was inadmissible, the defendant Rudish should, in the interest of justice, receive a new trial with that confession excluded."

In the case of your petitioner Wissner, not even such a colorable effort was made to protect him from the effect of his co-defendants' confessions. Instead, the Trial Court insisted, despite the strongest protestations, that the accusations of Wissner, by name, eighty-eight times repeated, remain and be submitted to the jury in the two confessions of the other defendants. Under the circumstances, if the constitutional rights of Cooper and Stein were violated by the admission of their confessions, only by the most sterile logic-chopping could it be said that Wissner's trial accorded him due process. The question, however, "whether under the Fourteenth Amendment a coerced statement may be excluded on objection of one not coerced into making it",

though hypothetically propounded in this Court's opinion in *Turner* v. *Pennsylvania*, 338 U. S. 62, 65-66, has still to be answered here.[3]

The fact that there were two confessions—naming Wissner a total of eighty-eight times—that both of his co-defendants had confessed—did not merely double the prejudice reasonably to be expected. By no mathematical computation can it be determined how much more prejudice results from such a situation, since the effect upon the jury of each confession must be many times multiplied by the circumstance that each is psychologically supported and substantiated by the other confession. It put Wissner in a position where all three of the other persons named with him in the indictment would testify against him, but he would be confronted by and permitted to cross-examine only one of them.

In *Snyder* v. *Massachusetts*, 291 U. S. 97, all members of the Court were in agreement that insofar as the right of confrontation entailed the privilege of cross-examining one's accusers, it was a part of the due process guaranteed by the Fourteenth Amendment, and the opinion states (at p. 107), in fact, that this is the real purpose of the privilege of confrontation as constitutionally protected:

> "It was intended to prevent the conviction of the accused upon depositions or ex-parte affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination."

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[3] In the *Malinski* case, *supra*, the case of Malinski's co-defendant Rudish was remanded to the New York Court of Appeals, rather than reversed, for the reasons stated immediately above in the text. In *Asheraft* v. *Tennessee*, 322 U.S. 143, 155-156, Asheraft's co-defendant Ware had also confessed his guilt. This Court remanded Ware's case to the Tennessee Supreme Court, stating that if that Court should reverse Ware's conviction, in the light of the reversal as to Asheraft, there would then be no occasion for this Court to pass on the federal question raised by Ware.

See also *Re Oliver*, 333 U. S. 257, 273, and *Williams* v. *New York*, 377 U. S. 241, 245.

The procedure now complained of in the case at bar is pregnant with essential unfairness for the very reason that it resulted in the conviction of the petitioner upon inadmissible depositions, i.e., the confessions of Cooper and Stein, which repeatedly inculpated the petitioner, without opportunity for cross-examination.

If the denial of a separate trial could by any strained reasoning appear to be within the limits of discretion, then this was surely a case where it was necessary for prosecution and court to exercise a caution increasing in degree as the offenses dealt with increased in gravity, so as to avoid unfairness, assuming unfairness could be avoided under such circumstances. Instead, we find the Trial Court and District Attorney here managing the difficult problem of justice with which they were confronted in a manner which was bound to *insure* prejudice to Wissner from the joint trial. This case is not comparable in this respect to the *Malinski* case where this Court felt the circumstances there justified only a remand of Rudish's case to the Court of Appeals rather than outright reversal.

Wissner's counsel strenuously entreated the Court to delete Wissner's name from the two confessions which were to be read to the jury. One would suppose that that was the least that would have been done. Such a procedural device was not unprecedented. *Malinski* v. *New York*, *supra*, 411. The Trial Court explicitly adverted (R. 1280) to its familiarity with the *Malinski* case, and was therefore presumably familiar with this Court's description (at p. 411 of the Report) of the method there adopted for protecting Rudish, who had been named in Malinski's confession; viz. the deletion of his name. But here the Court repeatedly refused, without reason, even this modicum of protection.

Why did the Court insist, over repeated objection and exception, in a case of this grave nature, that the oft-repeated name of Wissner remain in the confessions? It is difficult to conjure up any legitimate explanation for these rulings; in his brief in the New York Court of Appeals the District Attorney was able to summarize the confessions without ever mentioning Wissner's name, and without detracting in the least from their coherency.

There followed occurrences shocking in character, which could not have been brought about had petitioner's reiterated requests for deletion of his name been granted.

The District Attorney, in his summation, read extracts from each of the confessions to the jury. The brief excerpt thus read verbatim from Stein's confession mentioned Wissner's name five times (R. 2698).

From Cooper's confession he read as follows (R. 2697):

> "I made a turn onto Route 117, going south, and as I turned, I heard a shot. I stopped the truck about fifteen or twenty feet on Route 117 from the point of entrance to the Digest plant and looked back at the Digest truck and saw Wissner; * * *."

These were the *only* portions of the confessions of Cooper and Stein which the District Attorney elected to read verbatim to the jury during his summation—although of course the entire confessions had been read to the jury during the trial.

Subsequently, the Trial Court, in charging the jury, summarized the confessions in toto, giving minutely detailed prominence to all the accusations against Wissner contained therein. Curiously, the Court, like the District Attorney, took pains to *quote* verbatim from the confessions only a portion particularly harmful to Wissner, reading in part from Stein's confession (R. 2754):

> "While trying to clamber inside the Digest truck, I heard a shot and I glanced up at the man who was

seated alongside the Digest truck driver and saw that he was bleeding about the face, and that Wissner started climbing over him into the back of truck."

The Court continued:

> "Stein further said that when they were tying up the driver of the Reader's Digest truck, he said, 'Please don't hurt me,' and Wissner remarked, 'Shut up, or you'll get what the other fellow got.'"

Surely the Trial Court must have recognized that Wissner particularly would be prejudiced in the minds of the jurors, and improperly so, by including the following in its summary to the jury of Cooper's confession (R. 2748):

> "He said * * * that on the way down, Wissner told the rest of them when he approached the truck, he had shown the gun and shouted to the driver to get out from behind the wheel and open the door. The driver started to attempt to drive the truck and Wissner therefore had to shoot him."

It will be noted that the portion of Cooper's confession to which the jury's attention was thus directed at the close of the case could have little or no probative value against Cooper.

This Court may have difficulty locating in the Trial Court's charge the putatively protective instruction concerning Wissner that one might ordinarily expect to find coupled with a review of such evidence; it is necessary to search fourteen pages further along in the charge (R. 2769), in another portion thereof, for the instruction that the confessions were only to be considered against those making them. This instruction ostensibly was designed to erase from the jury's minds what had been so painstakingly implanted there; actually, it would seem to have been devised as a pro forma compliance with procedural requirements to protect against reversal.

As was stated in a different but similar context by Mr. Justice Jackson, concurring in *Krulewitch* v. *U. S.*, 36 U. S. 440, 453:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal* v. *U. S.*, 332 U. S. 539, all practicing lawyers know to be unmitigated fiction."

If their confessions were inadmissible against Cooper and Stein, the foregoing circumstances compel the conclusion that petitioner Wissner could not and did not receive a fair trial with these confessions before the jury, and that he was deprived of his constitutional right to due process.

But even if the confessions were admissible against Cooper and Stein, petitioner contends that under the circumstances their admission at a joint trial of the confessors and petitioner without deletion of petitioner's name, deprived petitioner of due process of law and vitiated petitioner's trial.

Respectfully submitted,

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APPENDIX

Statutory provisions to which reference is made in the foregoing brief:

Penal Law of New York, Sec. 1044:

"The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed: * * *

"2. * * * without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise;"

Penal Law of New York, Sec. 1844:

"A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate, having jurisdiction to take his examination, is guilty of a misdemeanor."

Code of Criminal Procedure of New York, Sec. 165:

"The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night. As amended L. 1882, c. 360, Sec. 1; L. 1887, c. 694."

Title 28, Sec. 1257, U. S. Code:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in

question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

(4940)